BEFORE THE KANSAS WORKERS COMPENSATION BOARD

DAVID ALLEN	)	
Claimant	)	
V.	)	
	)	
CARMAX INC.	)	
Respondent	)	Docket No. 1,037,512
AND	)	
	)	
CHARTER OAK FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant, through Joseph Seiwert, of Wichita, requested review of Administrative Law Judge Ali Marchant's February 18, 2015 Post-Award Medical Award. Vincent Burnett, of Wichita, appeared for respondent and its insurance carrier (respondent).

ISSUES

Claimant developed partial leg paralysis after a surgical attempt to relieve pain from his work injury. As a result, he required a wheelchair. Claimant had been living in a rented home. Respondent was willing to provide wheelchair accessible modifications to such home, but claimant's landlord did not renew his lease. Claimant moved into a wheelchair accessible apartment, which costs $640 more per month than his prior rent. Claimant requested respondent pay the difference. Respondent acknowledged a duty to modify his apartment, but it was already modified. The judge ruled claimant did not prove his additional monthly rent expense was related to his need for wheelchair accessible living or that his increased rent was medical treatment that was reasonable and necessary to cure or relieve the effects of his work-related accidental injury.

Claimant argues:

> Claimant acknowledges that respondent is not responsible for his rent. Respondent is, however, responsible for providing wheelchair accessibility. The only way for claimant to obtain that accessibility is by renting an accommodation that provides wheelchair accessibility. Claimant seeks payment of the difference in cost between his base rent payments . . . and the additional cost of renting an apartment that provides wheelchair accessibility. Claimant medically needs accessibility, and respondent is required to provide that. While conceding that it has a duty to provide accessibility, respondent offers no means to provide that accessibility other than they would be willing to modify his home if he had one. Respondent has offered no viable alternative.[1]

[1] Claimant's Brief at 2 (filed Mar. 13, 2015).

Respondent contends claimant's rent is not medical treatment. Respondent argues claimant's new apartment is priced the same as a comparable non-wheelchair accessible apartment, so the increase in rent is not for accessibility, but rather is for claimant's decision to live in a nicer, newer residence with more amenities.

The issue on appeal is whether a portion of claimant's monthly rent for a wheelchair accessible apartment is "medical treatment" that is reasonable or necessary to cure and relieve the effects of claimant's accidental injury, such that the cost is owed by respondent?

FINDINGS OF FACT

Claimant, who is 65 years old, was injured while working for respondent in Wichita in 2007. On April 8, 2009, claimant received an award based on a 56.5% permanent partial general bodily "work disability." Claimant's right to medical treatment was left open.

In August 2013, claimant moved into a nearly 100-year-old remodeled farmhouse in Buford, Georgia, about 50 miles north of Atlanta. Rent was $625 per month. His youngest adult son, Eric, eventually moved in with claimant. Eric did not pay rent.

Dr. Holiday, claimant's authorized pain management doctor in Georgia, suggested surgical insertion of a dorsal column stimulator. Dr. Holiday unsuccessfully attempted to implant the dorsal column stimulator. Claimant testified the procedure left him in constant pain and being "pretty much paralyzed" from the waist down.[2] He testified he has no bladder control, no feeling from the waist down and his legs are getting weaker. Claimant requires use of a wheelchair. He agreed he was "pretty much confined to a wheelchair," but can do some limited walking.[3] Claimant was in rehabilitation at the Shepherd Center from June through October 2014, where he had physical therapy five days per week.

Claimant realized his residence needed to be wheelchair accessible. Respondent retained Corey Staver of The David Corey Company, Inc., to inspect the farmhouse on August 22, 2014, and determine how to make the property accessible to claimant. Mr. Staver's report stated the landlord, Ms. Martin, told him:

> . . . she wanted nothing permanent done to the home and even more concerning, she stated that she was going to ask David and his son to leave the home after their lease was up which I believe was within a month. Ms. Martin expressed her frustration over the amount of debris in the yard and the poor condition of the interior of the home. She feels that it will be even worse since David will be less capable of maintaining the house when he returns.[4]

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[2] Claimant's Depo. at 7.

[3] *Id.* at 10.

[4] P.A.H. Trans., Resp. Ex. 2 at 15.

Mr. Staver recommended installing two portable aluminum wheelchair ramps. He noted Ms. Martin would not allow modifications to claimant's bedroom and the dining room. Claimant tried to get Ms. Martin to allow the farmhouse to be handicap accessible, but she did not want permanent alterations and did not want to renew his lease. Claimant acknowledged his lease would not be renewed regardless of his surgical complications.

On September 12, 2014, claimant filed an Application for Post-Award Medical seeking "modification of living space or payment of rent for accommodation of living space; vehicular modification; handicapped accessible apartment for claimant." Vehicular modification is not part of this appeal. Respondent provided vehicular modifications.

Claimant was discharged from the Shepherd Center. Claimant stated it was not entirely accurate at such time that he was independent with: (1) walking 400 feet; (2) transfers; and (3) activities of daily living. He contended he needed someone to follow him to make sure he did not fall. Claimant testified the movement in his legs improved, but he cannot tell when his feet are on the floor because he has no feeling in his legs.

Claimant testified that in October 2014, just before being discharged from the Shepherd Center, he found and rented a wheelchair accessible apartment in Suwanee, Georgia, about 10 miles from the farmhouse. His rent is $1,265 per month. The apartment has two bedrooms, but is one-half the size of the Buford house. Claimant testified the apartment was the "only place I could get in, period. There were . . . no wheelchair accessible apartments available, because there's just so few of them."[5]

Claimant testified he needed a wheelchair accessible apartment, but had difficulty finding one. Claimant testified he looked for wheelchair accessible rentals in multiple nearby counties and in Louisville, Kentucky, where another son lives. Claimant found rentals that were labeled "handicap accessible," but actually only allowed a wheelchair to fit through the front door, without much maneuverability once inside. Some so-called handicapped apartments did not allow his wheelchair to fit through doors or hallways.

Claimant testified he rents a two-bedroom apartment so his son, Eric, can live there and care for him. Eric assists claimant in carrying out activities of daily living. Eric drives claimant to medical appointments, shopping and other places. Claimant testified he cannot drive because he is on too much medication. While his car was modified with a lift to hold his wheelchair, someone else must lift the wheelchair onto the lift. Eric cooks, cleans, does laundry and all housework. Eric sometimes helps transfer claimant out of the wheelchair, but claimant normally tries to do this himself. Eric does not pay rent to live with claimant at the apartment. Claimant testified respondent was going to pay Eric to take care of him, but decided not to do so.

[5] Claimant's Depo. at 23.

The apartment complex is a gated community with a 24-hour fitness center, a beauty salon, entrance gate controlled access, a club room with a bar, elevators, resort-style saltwater pool with a gas grill and fireplace, extra storage, a resident business center/library, a social pavilion with landscaped greens and community garden, a wellness center and a yoga studio. Claimant testified he does not use the majority of the aforementioned amenities. Claimant denied renting the apartment to upgrade from his 100-year-old farmhouse. Instead, claimant stressed he rented the apartment because it was the only truly wheelchair accessible apartment he and his friends and relatives could find in his geographic area after a three month search.[6]

Jennifer Limbaugh, the property manager at the apartment complex, testified it is zoned for age 55 and older, but 20 percent of the units are available to persons aged under 55. She testified the complex is considered a middle-grade apartment community (it is a B-rated apartment complex not as nice as an A-rated complex, but it is better than C or D-rated complexes). Ms. Limbaugh testified the apartment complex amenities are provided at other apartment properties, except for the salon and the wellness room.

Ms. Limbaugh testified that by law, all apartments are wheelchair accessible. However, some wheelchair accessible apartments are modified with wider doorways and lower countertops and lower cabinets for someone in a wheelchair to use. Ms. Limbaugh testified claimant lives in a modified apartment with a basic finish rather than a remodeled upgraded finish. The modified bathroom has more room so a wheelchair can turn around.

Ms. Limbaugh testified under the Fair Housing Act, an apartment complex cannot charge differently for wheelchair or handicapped accessible apartments. Pricing is based on community market rate and apartment size. The modified apartment is priced in the middle of the other apartments. A two-bedroom apartment is more expensive than a one-bedroom apartment. A one-bedroom apartment starts at $1,100. There is no additional rent charge associated with the number of occupants in an apartment.

The judge's Post-Award Medical Award stated, in part:

> In the present case, there is no dispute that Claimant's work-related injuries have resulted in Claimant requiring a wheelchair to ambulate at least part of the time. Respondent has provided Claimant with a motorized wheelchair and made modifications to Claimant's automobile to transport the wheelchair. Respondent also began the process of evaluating Claimant's home in order to make any additional needed changes necessitated by the wheelchair; however, Claimant's landlord would not allow changes to the property and indicated that she did not intend to renew Claimant's lease anyway because of the condition of the property. As a result, Claimant moved into an apartment complex that is wheelchair accessible but has a much higher rent than Claimant's prior rental home.

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[6] *Id.* at 22-24.

> Claimant argues that his need for a wheelchair accessible apartment constitutes medical care under K.S.A. 44-510h(a). As a result, Claimant is seeking reimbursement for the difference in his monthly rent payments between the house he was previously renting and the wheelchair accessible apartment he moved into after his failed surgery to place a dorsal column simulator. However, Claimant has not presented any evidence to demonstrate that his additional monthly rent expense is related to his need for wheelchair accessible living.
>
> Claimant has moved into an apartment complex that is a gated community with considerable amenities, including a fitness center, yoga studio, beauty salon, and saltwater pool. It is not surprising that his rent at such a complex exceeds that of what he was paying for an older farmhouse without such amenities. Additionally, the apartment complex where Claimant is living does not charge a different rent amount for the wheelchair friendly unit Claimant lives in than any of the other regular apartment units. Claimant is merely paying monthly rent for a home to live in like anyone else would have to pay, regardless of whether or not they were wheelchair bound. Paying rent for an apartment that both Claimant and his adult son live in does not constitute medical treatment that is reasonably necessary to cure or relieve Claimant from the effects of his injury and should not be Respondent's responsibility.
>
> Claimant has failed to sustain his burden of proof that payment of the increase in his monthly rent constitutes medical treatment under the Act. Claimant's request for post-Award medical treatment benefits in the form of reimbursement of a portion of his monthly rent is CONSIDERED but DENIED.[7]

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

Claimant has the burden to prove his entitlement to benefits by a preponderance of the credible evidence based on the whole record.[8]

K.S.A. 2006 Supp. 44-510h(a) states medical compensation includes "medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation" to obtain medical treatment.

K.A.R. 51-9-2 states an apparatus means “such appliances as glasses, teeth, or artificial member.” The definition of an apparatus is broad.[9]

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[7] ALJ P.A.M. Award (Feb. 18, 2015) at 5.

[8] K.S.A. 2006 Supp. 44-501(a) and K.S.A. 2006 Supp. 44-508(g).

[9] *Roberts v. Midwest Mineral, Inc.*, No. 109,116, slip. op. at 4, 2013 WL 5507453 (unpublished Kansas Court of Appeals opinion filed Oct. 4, 2013).

Pursuant to K.S.A. 2006 Supp. 44-510k, the judge "can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award."

ANALYSIS

Respondent is responsible for providing claimant with reasonable and necessary medical treatment. Our Legislature has provided a non-inclusive statutory definition of medical treatment. Case law does not precisely define medical care or treatment. Treatment is "[a] broad term covering all the steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies."[10]

What is a reasonable medical necessity as compared to what is dictated by convenience and/or lifestyle is problematic.[11] The Legislature did not view reasonable and necessary treatment to be a claimant's "greater ease and comfort" and "all expenses associated with the accommodations that a disability may require."[12]

Determining what is medical treatment is fact-driven. Requests found to be reasonable and necessary medical treatment include modification to a home,[13] placement in an assisted living facility (without apportionment of the expense),[14] assistance for hygiene and grooming,[15] a stair lift,[16] modification to a vehicle to accommodate a claimant's injury,[17] a hot tub,[18] a computer,[19] increased internet service to assist claimant and his medical providers regarding his use of a special exercise bike[20] and a mattress.[21]

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[10] *Hedrick v. U.S.D. No. 259,* 23 Kan. App. 2d 783, 785, 935 P.2d 1083 (1997).

[11] *Butler v. Jet TV*, No. 106,194, 1998 WL 229860 (Kan. WCAB Apr. 14, 1998).

[12] *Hedrick,* 23 Kan. App. 2d at 787. See generally *Roberts*, supra, slip op. at 5-6.

[13] *Froese v. Trailers & Hitches, Inc.*, No. 1,036,333, 2010 WL 3093219 (Kan. WCAB July 27, 2010).

[14] *Butler v. Jet TV*, No. 106,194, 2004 WL 1058372 (Kan. WCAB Apr. 16, 2004).

[15] *Morey v. Via Christi Health System*, No. 1,027,871, 2006 WL 2632034 (Kan. WCAB Aug. 14, 2006).

[16] *Jardan v. Wal-Mart*, No. 1,048,563, 2012 WL 3279494 (Kan. WCAB July 23, 2012).

[17] *Froese v. Trailers & Hitches*, No. 1,036,333, 2008 WL 651685 (Kan. WCAB Feb. 29, 2008).

[18] *Fernandez v. Safelite Auto Glass*, No. 244,854, 2002 WL 31828620 (Kan. WCAB Nov. 20, 2002).

[19] *Fletcher v. Roberson Lumber Co.*, No. 231,570, 1999 WL 195653 (Kan. WCAB Mar. 30, 1999).

[20] *Sleezer v. LeRoy Coop Ass'n*, No. 1,070,971, 2015 WL 1524531 (Kan. WCAB Mar. 17, 2015).

[21] *Conner v. Devlin Partners, LLC*, No. 1,007,224, 2005 WL 831913 (Kan. WCAB Mar. 11, 2005).

Case law also delineates instances where expenses have not been deemed medical treatment. In *Carr,*[22] a claimant was denied hospital expenses incurred after he took an overdose of pain medication because such expenses were not an ordinary and necessary result of a claimant's accident. *Hedrick* demonstrates that a claimant's need for a larger car – even prescribed by a physician – is not reasonable or necessary medical treatment.

A van itself is not medical treatment, but equipping a van to be handicap accessible is a medical apparatus.[23] Payment of utility bills for a quadriplegic claimant is not medical treatment: "Everyone who owns or rents an apartment or a house has the responsibility to pay the expenses that are incurred in providing the essential utilities in order to live in the house or the apartment."[24]

As an initial matter, the Board disagrees with respondent's suggestion that claimant simply chose to live in a so-called "semi-luxury" apartment as a lifestyle choice.[25] Such conclusion lacks evidentiary support. Likewise, respondent's mention that claimant and his son were displaced from the farmhouse because they failed to maintain the property is not particularly germane to the legal issue – whether the increase in rent is medical treatment reasonable and necessary to cure or relieve the effects of claimant's work-related accidental injury.[26] Similarly, respondent's concern that claimant is not using the apartment fitness center, even though he was prescribed a home exercise routine, is lost on the Board.[27]

Respondent met its duty to provide claimant with a mechanized wheelchair. Obviously, respondent's duty to cure and relieve claimant of the effects of his work-related accident do not cease by giving claimant a wheelchair. Indeed, respondent recognized it had a duty to make the farmhouse claimant was renting wheelchair accessible and was apparently prepared to do so. However, claimant's lease was not renewed. As a result, respondent's willingness to modify the farmhouse is a hollow offer because claimant does not own or live in the farmhouse. Respondent's duty did not dissipate because claimant lost his farmhouse lease. At least in part, claimant had to leave the farmhouse because his landlord was not agreeable to permanent wheelchair friendly changes being made to the residence. Even if claimant lost his farmhouse lease because he failed to maintain the property, such "fault" is of little consequence. Respondent still has a duty to provide him with wheelchair accessible living arrangements.

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[22] *Carr v. Unit No. 8169*, 237 Kan. 660, 703 P.2d 751 (1985).

[23] *Butler v. Jet TV*, No. 106,194, 1998 WL 229860 (Kan. WCAB Apr. 14, 1998).

[24] *Bhattarai v. Taco Bell*, No. 261,986, 2002 WL 1838755 (Kan. WCAB July 26, 2002).

[25] *See* Respondent's Brief at 12-13 (filed Mar. 27, 2015).

[26] *Id.* at 10-11.

[27] *Id.* at 2.

Respondent also acknowledged a duty to make claimant's apartment wheelchair accessible, but claimant's current apartment is already wheelchair accessible. This obligation is meaningless because claimant is already renting a wheelchair accessible apartment.

Claimant's testimony that the apartment complex was his only option after a five county search near his prior residence in Georgia, in addition to exploring housing where another son lived in Louisville, Kentucky, was not contradicted. Respondent provided no alternatives. Respondent is responsible for paying the difference between claimant's rent at the farmhouse and his rent at the apartment complex, at least what it would cost him for a one bedroom apartment. The Board will not order respondent to pay the additional cost of a two bedroom apartment absent medical proof claimant's son's living expense is medical treatment designed to cure and relieve the effects of claimant's accidental injury.

The dissent and the judge point to the fact claimant could not show the cost for his wheelchair accessible apartment was more expensive than a non-wheelchair accessible apartment. Such argument asks for the impossible: the Fair Housing Act precludes an apartment complex from charging differently for wheelchair or handicapped accessible apartments.

Alternatively, subject to approval by the judge, respondent has the opportunity to place claimant in housing comparable to the farmhouse, assuming any such housing is wheelchair accessible or modified to fit claimant's medical needs. Until such time, respondent is obligated to pay claimant $475 per month, which is the difference in his rent prior to becoming a partial paraplegic and what it would cost him to rent a single bedroom apartment.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board reverses the Post-Award Medical Award. Claimant's increased rent is medical treatment designed to cure and relieve the effects of his work-related accidental injury.

AWARD

WHEREFORE, the Board reverses the Post-Award Medical Award and directs respondent to pay the claimant $475 per month for the difference in his rent prior to becoming a partial paraplegic and what it would cost him to rent a single room apartment. Respondent has the option, subject to the judge's approval, to provide claimant alternative wheelchair accessible living arrangements.

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

There is no evidence that the difference in price between what claimant paid for renting the farmhouse and his cost of rent at the apartment is "medical treatment" that is reasonable and necessary to cure or relieve him of the effects of his work-related accidental injury.

The increased rent is simply not medical treatment, let alone medical treatment that is reasonable or necessary to cure or relieve the effects of claimant's accidental injury. While a doctor's recommendation is not always medical treatment,[28] it is notable that the record contains no medical opinion that claimant's need for wheelchair accessible housing is medical treatment. The majority's position seems to start with a conclusion that claimant's increased rent is medical treatment, but the supporting evidence for such position is just not in the record. The Board does not explain how claimant's increased rent is medical treatment as defined by K.S.A. 2006 Supp. 44-510h(a).

As a secondary matter, claimant would have to pay rent regardless of his accidental injury and need for medical treatment. Paying for lodging is no different than paying for utilities, as we noted in *Bhattarai*, groceries or other requirements of life. Irrespective of his current disability, claimant's rent at the apartment complex – either for a wheelchair accessible unit or one that is not – would be the same. Stated another way, claimant does not have to pay higher rent because he is in a wheelchair.

[28] *Hedrick*, 23 Kan. App. 2d at 787-88.

The Board majority is correct that lessors are prohibited from charging a lessee a different rate for handicap accessible housing. This fact bolsters, and does not diminish, our argument. We dissenters need not show claimant is paying more for handicap accessible living. Our point is claimant is not paying more rent based on his handicap status. However, even if he were paying more rent for a similar non-handicap accessible apartment, such cost difference would still not fit even a loose definition of medical treatment.

Claimant's lease at the farmhouse was undoubtedly less expensive than his current living arrangement, but his injury and disability did not result in his losing his lease. Claimant acknowledged he was going to lose his lease regardless of his partial paraplegia. Understandably, claimant is paying more money for a nicer residence, but that does not mean the increased cost is somehow transformed into medical treatment aimed at curing or relieving the effects of his work-related accidental injury. The Board is perhaps reaching an equitable result, but respondent is not statutorily required to pay the difference.

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